77-286

No.

Supreme Court, U. S.
FILED
AUG 18 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

HARRIET MCGARRY, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

PATRICIA MCGARRY SCHELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App. A, separately bound) is reported at 549 F. 2d 587. The opinion of the district court (App. C) is reported at 370 F. Supp. 525.

JURISDICTION

The judgment of the court of appeals (App. A) was entered on December 6, 1976.[1] A timely petition for

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[1]The court of appeals did not enter its judgment as a separate document.

rehearing with suggestion for rehearing *en banc* was denied on March 21, 1977 (App. B). On June 10, 1977, Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including August 18, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States, having exercised its discretion by delegating to an independent contractor responsibility for safe performance of hazardous activities, may be held liable under the Federal Tort Claims Act for injuries resulting from the contractor's negligence, on the theory that the government has breached a purported nondelegable duty of care to see that the work done by the contractor is performed safely.

STATUTES INVOLVED

The Federal Tort Claims Act provides in part:

28 U.S.C. 1346(b):

> Subject to the provisions of chapter 171 of this title, the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2671:

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.
>
> "Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.
>
> * * * * *

28 U.S.C. 2680:

> The provisions of this chapter and section 1346(b) of this title shall not apply to —
>
> (a) Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> * * * * *

STATEMENT

This case arises out of the death of Thomas McGarry during his employment with Reynolds Electrical & Engineering Co. ("REECo"). REECo had contracted with the

Atomic Energy Commission ("AEC")[2] to manage, operate, and maintain the AEC's Nevada Test Site ("NST")[3] (App. A, p. 2a).

The NTS is a 1400 square mile reservation used by AEC as an outdoor laboratory. Pursuant to statutory direction (42 U.S.C. 2051), AEC did not carry out experiments itself but instead contracted with private organizations to perform them. Similarly, the AEC employed independent contractors, in this case REECo, to carry out the work necessary to operate the test site and conduct the experiments.

Under its contract, REECo was responsible, *inter alia*, for maintenance, repair, and operation of the electrical facilities and distribution system at NTS (App. C, pp. 20a-21a). The contract also provided that REECo would conduct safety programs and safety inspections (App. A, p. 4a). In addition, it required REECo to "take all reasonable precautions in the performance of the work under this Contract to protect the health and safety of employees and of members of the public and to minimize danger from all hazards to life and property, and [to] comply with all health, safety, and fire protection regulations and requirements * * * of the Commission" (App. A, pp. 2a-3a). Under the contract the AEC had the right to inspect the work and activities of the contractor as it deemed appropriate (App. A, p. 3a).

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[2]The pertinent functions of the AEC have since been transferred to the Energy Research and Development Administration. 42 U.S.C. (Supp. V) 5814.

[3]The facts, which are not in dispute, are set forth in the opinions of the district court (App. C) and the court of appeals (App. A).

Because the AEC carried out its functions primarily through independent contractors, it employed only a small number of people at NTS. Thus, while there were approximately 7,000 REECo employees at NTS at the time of the accident, the AEC had only about 30 people there, and, of these, only four had duties related to safety. The responsibility of the AEC's safety employees was only to review general safety practices; they did not oversee REECo's day-by-day activities. In contrast to the small staff of the AEC Safety Office, at the time of the accident REECo had a substantial safety department of between 18-20 employees, including safety inspectors whose function was to observe and monitor operations (App. A, pp. 3a-4a).

The accident in this case occurred at a barren location on the NTS when McGarry and a helper were engaged in preliminary drilling in preparation for routine exploratory work (App. A, p. 4a). REECo employees were aware that the drilling was to be near overhead power lines, but they did not notify the power dispatching office operated by other REECo employees in order to have the line de-energized or other safety precautions taken (App. A, p. 6a). The AEC Safety Office had no knowledge that operations were to be conducted near the power lines (App. A, p. 4a). The only information that the AEC had of the activity was contained in a letter to an AEC administrative office, whose sole function was to see whether funds were available and the proposal within the scope of a previously approved program. The letter listed the coordinates of the proposed exploratory hole but did not otherwise describe the location at which the work would be conducted (App. C, p. 60a; Tr. 114-115). McGarry was killed when the raised mast of the portable drilling rig he was driving made contact with a

live overhead power line at the work site (App. A, pp. 5a-6a).[4]

Following the accident, respondents, McGarry's wife, son, and daughter, filed actions under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.*, to recover damages for his death. After a bench trial, the district court held the United States liable and awarded damages of $185,000 to McGarry's wife, $65,000 to his son, and $50,000 to his daughter. The district court concluded (App. C, p. 107a):

> [Under Nevada law,] the AEC had the duty to use a standard of care commensurate with the risk involved in the ownership of the dangerous instrumentality, and such duty could not be delegated to REECo. The AEC, by failing to make certain that adequate safety measures and procedures were a part of the electrical distribution system, breached this nondelegable duty of due care.[5]

The court of appeals affirmed, stating (App. A, p. 9a):

> We conclude that the district court's determination of the rule that Nevada courts will adopt is reasonable; that under Nevada law as found by the district court a duty of care was owed by the AEC to REECo employees to take reasonable steps to assure that REECo was taking proper precautions respecting the hazards presented by engaging in work near the power line; and that the court's finding that AEC failed to meet its duty in this respect was not clearly erroneous.[6]

[4]Under the provision of the contract requiring REECo to comply with the Commission's safety requirements (*supra*, p. 4), REECo was required to comply with the AEC's safety code, which directed that drilling rigs were not to be driven with the mast in an upright position and that operations adjacent to overhead lines should not be initated until the operating authority had been notified (App. A, pp. 6a, 11a).

[5]The court rejected the government's defense of contributory negligence.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals, by making the United States liable for injuries caused by the negligence of its independent contractors, circumvents one of the principal limitations Congress has placed on the tort liability of the United States (see *United States* v. *Orleans*, 425 U.S. 807; *Logue* v. *United States*, 412 U.S. 521) and is inconsistent in principle with *Blaber* v. *United States*, 332 F. 2d 629 (C.A. 2).

The decision of the court below, that state law can impose a duty of care upon the United States to oversee with its own personnel the work done by independent contractors, is likely significantly to lessen the government's incentive to utilize private contractors to perform complex tasks. If the government fulfills such a duty of care, by undertaking close and detailed supervision of contractors engaged in activities requiring special safety precautions, it will be forced to maintain a large staff of government inspectors whose work will largely repeat the efforts of the contractor's own safety personnel. On the other hand, if the government chooses not to undertake such supervision, its potential liability with respect to work conducted through contractors will be enormously expanded.

[6]The court of appeals remanded the case, however, for further findings as to whether McGarry was negligent either for failing to see the power line or for driving the rig with the mast upright.

This is a matter of particularly grave concern in the Ninth Circuit. The court of appeals has construed the laws of both California and Nevada to impose such a duty (App. A, p. 8a), and it may be anticipated that the other states in that circuit will follow suit. Numerous major federal facilities are located in these western states, including military installations, dams, and other projects where work of a hazardous nature is performed daily by independent contractors. Thus, even though the precise question presented may be largely one of first impression, it warrants review by this Court.[7]

1. Under the Federal Tort Claims Act, the United States is liable only for injuries "caused by the negligent or wrongful act or omission of any employee of the Government * * *." 28 U.S.C. 1346(b). " 'Employee of the government' includes officers or employees of any federal agency" (28 U.S.C. 2671), but "federal agency" specifically "does not include any contractor with the United States" (*ibid.*). Thus Congress has "incorporated into the definitions of the Act the exemption from liability for injury caused by employees of a contractor." *Logue* v. *United States, supra*, 412 U.S. at 528. "Since the United States can be sued only to the extent that it has waived its immunity, due regard must be given to the exceptions, including the independent contractor exception, to such waiver." *United States* v. *Orleans, supra*, 425 U.S. at 814.

[7]The judgment below is interlocutory in that the case has been remanded to the district court for further proceedings, but it is a final determination of the legal issue presented here, which will control future litigation in the Ninth Circuit. This Court has granted review in similar circumstances. See, *e.g.*, *United States* v. *Orleans, supra*, 425 U.S. at 811-812. See also *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n. 3; *Land* v. *Dollar* 330 U.S. 731, 734 n. 2.

It is therefore well established that the United States cannot be held vicariously liable for the negligence of its contractor's employees. *United States* v. *Orleans, supra*; *Logue* v. *United States, supra*.[8] The courts below recognized and purported to follow this principle. But they nevertheless concluded that the United States may be held liable for the failure of its own employees adequately to supervise the hazardous activities of its contractors. This theory of liability, although couched in terms of the personal negligence of the government's own employees, at bottom rests upon the principle of vicarious liability.

At common law, as the district court discussed at length (App. C, pp. 43a-107a), a person who hires a contractor to perform hazardous work remains vicariously liable for injuries to third parties resulting from the contractor's negligence. See A.L.I., *Restatement (Second) of Torts*, §416 (1965).[9] The district court correctly acknowledged that the United States was not subject to such liability (App. C, p. 80a). The district court concluded, however, and the court of appeals agreed, that at least two states, Florida and California, also impose a "nondelegable" duty on the

[8]Similarly, since liability under the Federal Tort Claims Act arises only from "negligent or wrongful act[s] or omission[s]" (28 U.S.C. 1346(b)), the United States is not subject to strict or absolute liability for ultrahazardous activities. *Laird* v. *Nelms*, 406 U.S. 797; *Dalehite* v. *United States*, 346 U.S. 15.

[9]Such an employer has a duty of care with respect to the contractor's work, but he may delegate that duty by, for example, "provid[ing] in the contract that the contractor shall take * * * precautions." *Restatement (Second) of Torts, supra*, §413. As the district court recognized (App. C, p. 82a), however, the AEC satisfied its duty in that respect. See also p. 4, *supra*.

employer to see that the contractor's work is done safely,[10] that Nevada would follow California law, and that the United States had breached that nondelegable duty.

But this nondelegable duty is merely the imposition of vicarious liability in disguise. Indeed, the essence of any nondelegable duty is vicarious liability: to say that an employer has a nondelegable duty with regard to certain activites is simply a shorthand way of saying that even if the employer delegates to a contractor the responsbility for safely performing those activities, the employer remains liable for the contractor's negligence. See *Restatement*

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[10]The district court's conclusion concerning the law of those states is by no means free from doubt. It based its understanding of Florida law on *Emelwon, Inc.* v. *United States*, 391 F. 2d 9 (C.A. 5). But the Fifth Circuit inferred such a rule from Florida cases holding that an owner of property may not escape liability for failing to prevent or correct an unsafe condition merely by hiring a contractor to manage the property or make repairs (391 F. 2d at 11) and from decisions by other state courts that imposed vicarious liability in circumstances similar to the facts there at issue (391 F. 2d at 12). The decisions referred to in the *Emelwon, Inc.* opinion do not appear to endorse the rule therein attributed to Florida.

The district court's understanding of California law rested upon *Thorne* v. *United States*, 479 F. 2d 804 (C.A. 9), in which the Ninth Circuit in turn had derived its view of California law from *Van Arsdale* v. *Hollinger*, 68 Cal. 2d 245, 437 P. 2d 508 (Sup. Ct.). But the decision in *Van Arsdale* was based upon a theory of vicarious liability. See 68 Cal. 2d at 253, 437 P. 2d at 513.

(Second) of Torts, supra, at p. 394.[11] But "[l]iability * * * under the Act is not to be broadened beyond the intent of Congress by dressing up the substance of [vicarious] liability * * * in the garments of [nondelegable duty]." *Laird* v. *Nelms, supra*, 406 U.S. at 802.

In short, the theory of liability adopted by the courts below is one of vicarious liability that cannot be applied to the United States in the face of the government's statutory exemption from liability for torts committed by the employees of independent contractors.[12] "While [the] congressional choice [of granting that exemption] leaves the courts free to look to the law of torts and agency to define 'contractor,' it does not leave them free to abrogate the exemption * * *." *Logue* v. *United States*, *supra*, 412 U.S. at 528.

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[11]The nondelegable duty imposed by the courts below appears to be coextensive with the duty of care owed by the contractor itself. The accident resulting in McGarry's death occurred because (1) McGarry drove the rig with mast raised, apparently without observing the overhead power lines, and (2) McGarry's supervisor, also a REECo employee, failed to notify the power dispatch office that work was being performed near the lines. In other words, the accident was caused by the negligence of workmen functioning at the operational level. Since that negligence was attributed to the government under the theory of liability adopted below; it is not clear what negligence of the contractor would not be so attributed. Thus the theory appears to be one of full vicarious liability. But even if the government's nondelegable duty were narrower than the contractor's duty of care, the theory of liability adopted below would remain one of vicarious liability, albeit with a savings clause: the United States would be vicariously liable for its contractor's negligence *unless* it had satisfied its own vaguely and subsequently defined nondelegable duty.

[12]Because of the existence of vicarious liability at common law, the theory of liability adopted by the courts below would be irrelevant or redundant, except as to employers not otherwise subject to vicarious liability. Indeed, the district court acknowledged that "[i]n the normal non-FTCA case, [a nondelegable] duty would not be resorted to because it would be superfluous" (App. C, p. 103a). In other words, this theory is a special rule, applicable in practice only to the United States, the sole effect of which would be to circumvent the federal government's immunity from vicarious liability. This consideration serves to emphasize that the theory adopted below is simply one of vicarious liability in disguise.

2. Imposition of the nondelegable duty identified by the courts below would be inconsistent with the United States' discretion to delegate responsibility for safe performance of hazardous activities. The AEC, in particular, had discretion to include in its contracts for research and development such health and safety provisions "as the Commission may determine." 42 U.S.C. 2051(d). The Second Circuit therefore has rejected the contention "that the AEC had a mandatory duty to assume control of the safety operations of independent firms doing work under contract for the United States." *Blaber* v. *United States, supra*, 332 F. 2d at 630. The court reasoned (332 F. 2d at 631):

> The AEC may have considerable power to control the activities of private companies through contracts, but when the Commission decides the extent to which it will undertake to supervise the safety procedures of private contractors, it is exercising discretion at one of the highest planning levels. Decisions of this kind are therefore within the "discretionary function" exception of 28 U.S.C. §2680(a).

Here, the AEC chose to require REECo to "take all reasonable precautions in the performance of the work under this Contract to protect the health and safety of employees * * * and to minimize danger from all hazards to life and property * * *" (App. A, p. 2a). Since that decision represented the exercise of a discretionary function, *a fortiori* it was not an actionable breach of a nondelegable duty. Cf. *Dalehite* v. *United States, supra*, 346 U.S. at 35-36.[13]

[13]The court of appeals reasoned that the AEC's reservation of a right to inspect the work "and to stop all work should REECo fail to comply with health, safety and fire protection requirements" (App. A, p. 11a) made the discretionary function exemption of the Act inapplicable (*ibid.*):

> As a matter of policy, then, the AEC chose to retain some responsibility over matters of employee safety. The meeting of that responsibility was an operational function.

But the court overlooked that there was no finding here that the AEC's safety inspectors themselves had been negligent. Liability was predicated upon AEC's failure to implement a more comprehensive plan of supervision, *i.e.*, its failure to supervise the safety of all routine activities. But that "failure" itself was an exercise of discretion. Moreover, it is well established that retention of a right to inspect does not subject the United States to a duty to safeguard the contractor's employees. See, *e.g.*, *Lipka* v. *United States*, 369 F. 2d 288 (C.A. 2), certiorari denied, 387 U.S. 935; *Fisher* v. *United States*, 441 F. 2d 1288 (C.A. 3); *Market Insurance Co.* v. *United States*, 415 F. 2d 459 (C.A. 5); *Gowdy* v. *United States*, 412 F. 2d 525 (C.A. 6), certiorari denied, 396 U.S. 960; *Wright* v. *United States*, 404 F. 2d 244 (C.A. 7); *Jeffries* v. *United States*, 477 F. 2d 52 (C.A. 9); *United States* v. *Page*, 350 F. 2d 28 (C.A. 10), certiorari denied, 382 U.S. 979.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1977.